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MESSAGE FROM THE CHAIRS

Peter Condron and Shelly Geppert

The holidays are fast approaching and we are reviewing the latest, most significant cases from across the country to help you recover from all that tryptophan. Articles featured in this issue discuss a Ninth Circuit case on CERCLA contribution claims, a Fifth Circuit case concerning a contractor's criminal liability, and a case before the Second Circuit addressing whether claims are time-barred or not yet ripe, among many others. A big thanks to authors Steven German, Laura Glickman, Whitney Hodges, Alison N. Kleaver, Sonia H. Lee, Bridget R. Reineking, Whitney Jones Roy, and Brian Wauhop for their efforts in identifying and presenting you with the cases that should be on your radar.

We encourage you to explore the Section's new, exclusive online community, SEER Connect (http://ambar.org/seerconnect/), where you can post and review others' thoughts on everything from breaking news, cases, and rules and regulations to volunteer opportunities and local networking events. We challenge you to draft a post and start a discussion on an environmental litigation matter of interest to you.

Finally, it was a pleasure to catch up with so many of our members at the Fall Conference in Baltimore. And we look forward to seeing more of you at the upcoming 45th Spring Conference, set for April 18–20 in Orlando. Registration is open and you can view information on all the panels via the conference's webpage. A few panels that may be of interest to you include Next Generation of Toxic Torts; Science on Trial; and Interstate Water Disputes. Our room block is quickly filing up, so be sure to reserve your spot.

Until next issue,
Shelly and Pete

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In this issue:

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

December 12, 2017
It's a New Day: California's Cap and Trade Extension Legislation and Its Impact on Federal and International Climate Change Programs
CLE Webinar

January 25-27, 2018
2018 Environmental & Energy, Mass Torts and Products Liability Committees' Joint CLE Seminar
Whistler, BC, Canada
Primary Sponsor: ABA Section of Litigation

March 8, 2018
Shifting Policies for a Shifting Environment: Environmental Policy Symposium
The University of Mississippi School of Law
Oxford, MS

April 18-20, 2018
47th Spring Conference
Hilton Bonnet Creek
Orlando, FL

For full details, please visit www.ambar.org/EnvironCalendar

CASE LAW HIGHLIGHTS: MOUNTAIN/ WEST COAST

NINTH CIRCUIT WEIGHS IN ON CIRCUIT SPLIT REGARDING CERCLA CONTRIBUTION CLAIMS AFTER SETTLEMENT AND THE STATUTE OF LIMITATION

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

***Asarco, LLC v. Atlantic Richfield Company*, 866 F.3d 1108 (9th Cir. 2017).** In a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) contribution case, the Ninth Circuit addressed three issues of first impression for the circuit related to the ability to pursue contribution after settlement and the application of the statute of limitation. Specifically, the court looked at (1) whether a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA contribution claim; (2) whether a "corrective" measure under the Resource Conservation and Recovery Act (RCRA), qualifies as a "response" action under CERCLA; and (3) what it means for a party to "resolve its liability" in a settlement agreement. *Id*. at 1113. The Ninth Circuit concluded that a settlement under RCRA may give rise to a CERCLA contribution claim and that corrective measures under a RCRA decree may constitute response costs under CERCLA. *Id*. at 1113–14. The court found that the CERCLA contribution claim at issue was not barred by the statute of limitation because plaintiff Asarco, LLC (Asarco) did not "resolve its liability" under a 1998 RCRA consent decree, and, therefore, could not have brought its contribution action until a subsequent CERCLA consent decree was issued. *Id*.

The East Helena Superfund Site ("Site"), located in and around an industrial area in Montana's Lewis and Clark County, includes Asarco's former lead smelter and a zinc fuming plant operated by ARCO's predecessor Anaconda Mining Company (Anaconda). *Id*. at 1114. The Site has been a locus of industrial production for more than a century, associated with decades of hazardous waste. *Id*. Specifically, the lead smelter discharged toxic compounds, including lead, arsenic, and other heavy metals, into the air, soil, and water, ultimately resulting in the U.S. Environmental Protection Agency (EPA) placing the Site on CERCLA's National Priorities List. *Id*. Asarco alleges that Anaconda's zinc fuming plant contributed to this contamination. *Id*. at 1115.

In 1998, the United States brought RCRA and Clean Water Act claims against Asarco for civil penalties and injunctive relief, alleging Asarco illegally disposed of hazardous waste at the Site. Asarco and the United States eventually reached a settlement approved by the federal district court ("RCRA decree"). *Id*. at 1114. In addition to assessing civil penalties, the RCRA decree required Asarco to take certain remedial actions to address past violations. *Id*. Asarco failed to meets its cleanup obligations required pursuant to the RCRA decree. *Id*.

In 2005 Asarco filed for Chapter 11 bankruptcy protection. The United States and Montana filed claims in Asarco's bankruptcy proceeding, asserting joint and several liability claims under CERCLA. *Id*. at 1114–15. In 2009, the bankruptcy court entered a consent decree ("CERCLA decree") between the parties that established a custodial trust for the Site, turning over cleanup responsibility to a trustee. *Id*. at 1115. Additionally, Asarco paid $99,294,000 to fully resolve and satisfy its obligations under the RCRA decree. *Id*.

On June 5, 2012, Asarco brought an action against ARCO under CERCLA section 113(f)(3)(B), which allows persons who have taken action to clean up hazardous waste sites to seek monetary contribution from other parties who are also responsible for the contamination. *Id*. This section provides that a person that has "resolved its liability" for "some or all of a response action or for some or all of the costs of such action" pursuant to a settlement agreement with the government

"may seek contribution from any person who is not party to a settlement." *Id*. at 1113. In response, ARCO filed a motion for summary judgment, arguing Asarco's action was untimely because it was not filed within the CERCLA-imposed three-year statute of limitation after entry of the judicially approved RCRA decree. *Id*. at 1115.

Using canons of statutory construction, legislative history, the statute's broad remedial purpose, and EPA's own interpretation, the court first came to the "inexorable conclusion that Congress did not intend to limit [section] 113(f)(3)(B) to response actions and cost incurred under CERCLA settlements," and, therefore, held that a non-CERCLA settlement agreement may form the basis for a CERCLA contribution action. *Id*. at 1118–21. In arriving at this decision, the Ninth Circuit added to the current circuit split on this issue, siding with the Third Circuit and finding the Second Circuit's alternative position unpersuasive. *Id*. at 1120 (comparing holdings in *Trinity Industries, Inc. v. Chicago Bridge & Iron Co*., 735 F.3d 131 (3d Cir. 2013) and *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), with *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005)).

The court then analyzed the language of the RCRA decree to determine whether the obligations the decree imposed on Asarco amounted to "response actions." *Id*. at 1121. The court, acknowledging that "response actions," as defined under CERCLA, cover a broad array of cleanup activities, emphasized numerous provisions in the RCRA decree that obligated Asarco to "implement interim remedial measures to 'control or abate[] . . . threats to human health and/or the environment', prevent or minimize the spread of hazardous waste 'while long-term corrective measures were being evaluated', remove and dispose of contaminated soil and sediment . . . , and implement[] 'corrective measures' to 'reduce levels of waste or hazardous constituents.'" *Id*. These actions, as determined by the court, demonstrate that the RCRA decree did require Asarco to take response actions at the Site. *Id*.

The Ninth Circuit rejected the district court's ruling that the statute of limitation barred Asarco's action against ARCO, holding that Asarco's claim was timely based on the subsequent CERCLA decree and not the RCRA decree. Id. at 1121–26. In reaching this conclusion, the court determined the RCRA decree did not resolve Asarco's liability because it did not decide with "certainty and finality" Asarco's obligations for at least some of its response actions or costs. Id. at 1125–26. Finding that determinations to resolve a party's liability depend on a case-by-case analysis of the agreement's terms, the court determined the RCRA decree's release provision was limited to liability with respect to claims for civil penalties and did not resolve Asarco's liability for its response actions or costs. Id. The court also noted multiple provisions in the RCRA decree that referenced Asarco's continued legal exposure, including CERCLA liability for response costs, and preserved all of the government's enforcement options. Id.

In contrast, the court found the CERCLA decree did resolve Asarco's liability for response costs at the Site, and released Asarco from liability for all response obligations under prior settlements, including the RCRA decree's corrective measures, in exchange for Asarco's funding of the custodial trust accounts. *Id*. at 1127–29. Moreover, under the CERCLA decree, the government did not reserve any rights to hold Asarco liable beyond its payment obligations therein and capped financial obligations at the agreed upon $99,294,000. *Id*. at 1128. As a result, the court held that Asarco's claim was timely based on the CERCLA decree, and vacated the district court's ruling, remanding the case back to the district court for a determination of whether Asarco is entitled to compensation from ARCO, and, if so, in what amount. *Id*. at 1129.

This decision provides guidance for parties when drafting CERCLA settlement agreements and informs a party interested in seeking contribution that it should include language clearly releasing the party from liability for all obligations and costs and that it is not subject to ongoing remedial obligations. This decision encourages

the use of express release acknowledgments and suggests eliminating provisions that preserve the government's enforcement options, including the right to hold a party liable under another statute.

TENTH CIRCUIT TAKES EXPANSIVE VIEW OF THE DEFINITION OF THE TERM "MINING," HOLDING WIND FARM PROJECT NEEDS PERMIT PRIOR TO COMMENCEMENT OF EXCAVATION IN TRIBAL MINERAL ESTATE

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

***United States of America v. Osage Wind, LLC et al.*, ___ F.3d ___, 2017 WL 4109940 (10th Cir. Sept. 18, 2017).** Causing heartburn for project applicants developing on tribal land, the Tenth Circuit reversed the District Court for the Northern District of Oklahoma's grant of summary judgment and determined that the defendants' large-scale excavation project, involving site modification and the use of excavated rock and soil in the installation of wind turbines, constituted "mining" under federal regulations addressing mineral development on Native American land. *Id*. at *1. This decision creates new obligations for developers, which could result in delay and additional costs.

In 1872, Congress established a reservation for the Osage Nation pursuant to the Act of June 5, 1872. While the subsequent Act of June 28, 1906 (Osage Act) created freely alienable lots from the surface estate of the reservation to be parceled out to individual tribe members, it severed the Osage mineral estate from the surface estate and reserved it for the benefit of the collective Osage Nation. *Id*. The Osage Act empowered the Osage Nation, as the beneficial interest in the mineral estate, to issue leases for "all oil, gas, and other minerals" in the estate. *Id*. Those leases would then require approval of the U.S. Department of the Interior (DOI). *Id*.

In furtherance of this power, DOI promulgated several rules. *Id*. at *2. One such rule is 25 C.F.R. part 211.3, which defines mining as "the science, technique and business of mineral development . . . if the extraction of such mineral exceeds 5,000 cubic yards in any given year." DOI also adopted 25 C.F.R. part 214, which provides "[n]o mining or work of any nature will be permitted upon any tract of land until a lease covering such a tract shall have been approved by the Secretary of the Interior."

In September 2014, Osage Wind, LLC (Osage Wind) commenced excavation for its planned commercial wind farm (the "Project") on 1.5 percent of the 8400 acres of private fee land in Osage County under lease with the Osage Nation. *Id.* at *2–3. The Project required the installation of 84 wind turbines secured in the ground by reinforced concrete foundations, underground electrical lines running between turbines, a substation, an overhead transmission line, meteorological towers, and access roads. *Id*. at *2.

Each turbine required the support of a cement foundation up to ten (10) feet deep and sixty (60) inches in diameter. *Id*. at *2. In creating the large holes needed for these foundations, Osage Wind excavated soil, sand, and rock of varying sizes. *Id*. Rocks smaller than three (3) feet were crushed into smaller sizes that were then pushed over the completed foundation and compacted into the remainder of the hole. *Id*.

In November 2014, the United States, as trustee of the Osage mineral estate, filed suit for damages resulting from this excavation work, alleging the excavation and extraction were "mining" under 25 C.F.R. § 211.3, thereby requiring a mineral lease pursuant to 25 C.F.R. § 214.7. *Id*. The district court disagreed with this allegation, and awarded summary judgment in favor of Osage Winds. *Id*. Osage Mineral Council (OMC), intervenor and representative of the Osage Nation as it relates to the Osage mineral estate, appealed on this issue. *Id*.

In its opinion, the Tenth Circuit explained its analysis did not depend on administrative deference to DOI materials and would, instead, focus on the regulatory text by its own terms. *Id*. at *6–7. Under this lens, the court took issue with

the district court's holding that the definition of mining necessarily involves the commercialization of mineral materials (i.e., the sale of minerals). *Id*. at *8. The court specifically found that, while the definition of mining "certainly *includes* commercial mineral extraction and even offsite relocation of materials, the district court's limitation of 'mineral development' to those contexts is overly restrictive." *Id*. (emphasis included). It found no support in the text of 25 C.F.R. § 211.3 confining mineral development merely to the commercialization or relocation of materials. Moreover, the court was not persuaded by Osage Wind's attempts to support the district court's narrow construction of the term at issue by reference to other provisions that contemplate the sale of minerals. *Id*.

Instead, recognizing the long established principle that ambiguity in laws designed to favor Native Americans ought to be liberally construed in their favor, the court adopted the interpretation of § 211.3 that favors the Osage Nation because the regulations at issue were designed to protect Native American mineral resources and "maximize [their] best economic interest." *Id*. at *9 (quoting 25 C.F.R. § 211). Under the principles of statutory interpretation, the court also found that each item in the definition of "mining" involves an action upon the minerals to "take advantage of them for some purpose." *Id*. This would include actions upon the minerals in order to exploit the minerals themselves, as was done by Osage Wind when it sorted and crushed the excavated rocks for backfill in the foundation holes and stabilization of the turbines. *Id*. at *10. Holding Osage Wind's excavation work constituted "mining" under section 211.3, the court determined Osage Wind impermissibly failed to secure a federally approved lease from OMC under section 214.7, rendering the lower court's summary judgment for Osage Wind improper.

TENTH CIRCUIT HOLDS BUREAU OF LAND MANAGEMENT IMPROPERLY RELIED ON UNSUPPORTED AND IRRATIONAL ASSUMPTION IN ANALYZING ENVIRONMENTAL IMPACTS OF COAL MINING LEASES

Whitney Jones Roy, Whitney Hodges, and Alison N. Kleaver

***WildEarth Guardians v. United States Bureau of Land Management, et al.*, 870 F.3d 1222 (10th Cir. 2017).** WildEarth Guardians and the Sierra Club (collectively, "Plaintiffs") brought a claim under the Administrative Procedure Act (the "Act") against the Bureau of Land Management's (BLM), challenging the BLM's decision to grant four coal leases in Wyoming's Powder River Basin. The basin accounts for almost 40 percent of the United States' total coal production, and the subject leases would extend the life of two mines that provide almost 20 percent of the United States' annual domestic coal production. *Id.* at 1227. Plaintiffs alleged the BLM's determination that the leases would not have a significant effect on national carbon dioxide emissions, as compared to the "No Action" alternative, was arbitrary and capricious because (1) it was not supported by the administrative record and (2) the BLM failed to acquire information "essential to a reasoned choice among alternatives." *Id.* at 1233–34. The Tenth Circuit agreed the decision was not supported by the record and remanded to the district court with instructions to enter an order requiring the BLM to revise its Environmental Impact Statement (EIS) and Records of Decision, but refused to vacate the leases themselves. *Id.* at 1240.

The BLM approves mining infrastructure and issues mining leases within much of the Powder River Basin area. *Id.* at 1227. In its EIS and, later, in its Records of Decision for each of the leases, the BLM concluded that there would be no appreciable difference in the United States' total carbon dioxide emissions under its preferred action—granting the leases—as opposed to a "No Action" alternative in which none of the leases

would be issued. *Id.* at 1227–29. The BLM's conclusion relied upon the assumption there would be no decrease in U.S. coal consumption because third party sources would be able to supply the market with the same amount of coal when compared to what would be mined under the leases. *Id.* at 1228–29.

Under the Act, an agency's decision is unlawful if its actions, findings, or conclusions are arbitrary and capricious. *Id.* at 1233. A decision is arbitrary and capricious if it (1) fails to consider an important aspect of the problem; (2) contradicts the evidence before the agency or is so implausible that it cannot be attributed to a difference of opinion; (3) is not based upon consideration of the relevant factors; or (4) is a clear error in judgment. *Id.* The Tenth Circuit noted that this deferential standard focuses on the decision-making process. Furthermore, the National Environmental Policy Act requires agencies to "take a 'hard look' at the environmental effects of the alternatives before it." *Id.* (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1445 (10th Cir. 1992)). Thus, while an agency may select a more environmentally harmful alternative, its reasons for doing so must be rational and disclosed. *Id.*

The Tenth Circuit agreed that the BLM's assumption that there would be no change in coal consumption because coal supplied by other sources would meet market demand without any increase in price was not supported by evidence in the administrative record. In so holding, the Tenth Circuit noted that the BLM provided no citation indicating that the coal deficit under the "No Action" alternative (some 320 million tons per year) could be filled from elsewhere or at a comparable price. *Id.* at 1234. The BLM made no reference to available stores of coal, rates at which such coal could be extracted, or whether any price differential might affect substitutability. *Id.* Furthermore, the Tenth Circuit agreed that the assumption was contradicted by the very resources upon which the BLM relied to support its decision. *Id.* Specifically, the BLM cited the Energy Information Administration's 2008 Energy Outlook prediction that coal production would continue to increase, but ignored the portion of that document that found that higher coal prices drive down coal consumption in favor of alternative energy. *Id.* at 1234–35. While the BLM argued that an overall increase in demand for electricity would override any potential decrease in demand for coal to due to price increases, it cited no evidence to support such conclusion. *Id.* at 1235. The Tenth Circuit noted that the BLM's assumption "falls below the required level of data necessary to reasonably bolster the [BLM's] choice of alternatives." *Id.*

The Tenth Circuit also held that the BLM's decision was arbitrary and capricious because the perfect substitution argument was irrational. *Id.* at 1236. Noting that the Tenth Circuit had not previously addressed when an assumption made by an agency in its EIS violates the "rule of reason," rendering the analysis unenforceable, the court drew upon the rule articulated by the Supreme Court in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983). The Supreme Court looked to three factors to determine whether an assumption used by the Nuclear Regulatory Commission to conclude that permanent nuclear waste storage would not have a significant environmental impact was arbitrary and capricious: (1) whether the assumption had a limited purpose in the overall analysis; (2) whether the agency's estimation of the environmental effects was overstated; and (3) whether the agency's decision was based on special expertise, rather than simple findings of fact. *Id.* (citing *Baltimore Gas & Electric Co.*, 462 U.S. at 102–04). Here, the BLM's assumption was key to its decision, overstated, and not based upon special knowledge "on the frontiers of science."

The Tenth Circuit remanded the case to the district court with instructions to enter an order requiring the BLM to revise its EIS and Reasons of Decision. The Tenth Circuit declined to vacate the leases, recognizing that Plaintiffs' appeal focused on a fairly narrow issue and there was insufficient evidence before the Tenth Circuit to determine

what would happen to the leases if the lease tracts were enjoined. *Id.* at 1240.

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CASE LAW HIGHLIGHTS: MIDWEST

NORTHERN DISTRICT OF INDIANA TOSSES NUISANCE AND NEGLIGENCE CLAIMS AS TO CERTAIN DEFENDANTS BUT DENIES DISMISSAL OF CERCLA CLAIMS IN PUTATIVE CLASS ACTION INVOLVING SUPERFUND SITE

Sonia H. Lee

***Rolan v. Atl. Richfield Co.*, No. 1:16-CV-357-TLS, 2017 WL 3191791 (N.D. Ind. July 26, 2017).** An Indiana federal judge dismissed nuisance and negligence claims as to certain defendants but left intact claims against all defendants brought under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (CERCLA), in a putative class action involving local residents' allegations of personal injury and property damage allegedly caused by defendants' remediation efforts at the USS Lead Superfund Site located in East Chicago.

In 2016, the U.S. Environmental Protection Agency (EPA) discovered high levels of lead and arsenic in the soil of properties owned by local residents in East Chicago. Plaintiffs' lawsuit followed, wherein plaintiffs sought recovery against defendants Atlantic Richfield Company (Atlantic Richfield), E.I. du Pont de Nemours and Company (DuPont), and a spin-off of DuPont, The Chemours Company (Chemours), for damages incurred as a result of the contamination. Plaintiffs advanced causes of action for nuisance, negligence, and cost recovery under Section 107(a) of CERCLA.

Before the court was defendants' motion to dismiss. With respect to plaintiffs' cause of action for nuisance, the court found that plaintiffs failed to state a claim against Atlantic Richfield, citing the well-settled rule that a subsequent purchaser of property (i.e., the plaintiffs) cannot sue a prior owner of that same property (i.e., Atlantic Richfield) for nuisance, as the latter owes no duty to the former. *Id.* at *15. Relying on Indiana case precedent, the court also dismissed plaintiffs' nuisance claims as to DuPont and Chemours because plaintiffs only alleged that the "contamination occurred and persists," not that any contamination is "ongoing" at present, as required as a matter of law. *Id.* at *16.

As to plaintiffs' negligence claims against defendants, the court agreed with Atlantic Richfield that Indiana law precludes plaintiffs' negligence claim against it, particularly where there was no relationship between plaintiffs and Atlantic Richfield, "as it was not reasonably foreseeable that the land would be converted into a residential housing complex" at that time, and that Atlantic Richfield's conduct would cause harm to the local tenants "decades later." *Id.* at *17. However, the court ruled it was premature to dismiss plaintiffs' nuisance claims against DuPont and Chemours, noting that the allegations plausibly suggested it was reasonably foreseeable that DuPont and Chemours' alleged conduct at their plant, which neighbored the property upon which plaintiffs lived, could have been a proximate cause of the allegedly negligent contamination of plaintiffs' properties. *Id.* at *18.

The court also declined to dismiss plaintiffs' claim for cost recovery under Section 107(a) of CERCLA as to all defendants. In declining to dismiss the claim, the court noted, inter alia, that the record must be developed before it could

determine whether plaintiffs' investigative costs were duplicative and whether relocation costs were necessary and consistent with the national contingency plan.

EASTERN DISTRICT OF KENTUCKY JUDGE GRANTS SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS IN FAILURE TO WARN PRODUCT LIABILITY ACTION

Sonia H. Lee

***Brown v. Arch Wood Prot., Inc.*, No. CV 13-61-HRW, 2017 WL 4274160 (E.D. Ky. Sept. 26, 2017).** An Indiana federal judge ruled that defendants were entitled to summary judgment as a matter of law on plaintiff's product liability claim because plaintiff, who alleged he was occupationally exposed to arsenic, had failed to present sufficient evidence to support a reasonable inference that he was exposed to defendants' products on which he worked. In addition, the court found plaintiff's efforts to demonstrate a concert of action failed because no evidence supported such a theory. Having "failed to demonstrate a *prima facie* element of his case sufficient to survive summary judgment," the court therefore also denied as moot plaintiff's motions for summary judgment on causation and failure to warn. *Id.* at *19.

Plaintiff alleged he was exposed to arsenic, chromium, and copper contained in the chromated copper arsenate (CCA) chemical compound used to preserve the wood in utility poles and cross-arms that plaintiff handled during his employment at Kentucky Power Company (Kentucky Power). Plaintiff maintained he was diagnosed with "adverse health effects consistent with significant exposure to arsenic from the CCA utility poles he handled, sawed, drilled, and extinguished fires [on]." *Id.* at *2.

In granting summary judgment to defendants on plaintiff's product liability claim, the court found plaintiff had "not identified a single pole that he worked on and thus cannot connect his injuries to any of the Defendants' products." *Id.*at *5. The court also found no evidence to support plaintiff's concert of action theory, which plaintiff relied upon to defeat defendant's motion for summary judgment, wherein plaintiff sought to establish that defendants "acted in concert to conceal the hazards of arsenic in CCA-treated utility poles." *Id.* at *5.

In so ruling, the court denied plaintiff's motions for summary judgment on, inter alia, causation and failure to warn, and entered judgment in favor of defendants, observing: "[Plaintiff] has not pointed to any evidence supporting a reasonable inference that he was exposed to any of these Defendants' specific products. Nor has he raised any issues of fact on his concert of action theory. Thus, . . . the Court will grant Defendants' Motion for Summary Judgment on Product Identification. Because lack of product identification is dispositive of the case, the parties' respective challenges on causation, failure to warn and Plaintiff's opinion testimony are moot, as is Plaintiff's Motion seeking to compel initial disclosures."

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FIFTH CIRCUIT DISMISSES OCSLA FELONY CHARGES AGAINST OIL RIG CONTRACTORS

Brian Wauhop

***United States v. Moss et al.*, ---F.3d ----, 2017 WL 4273427 (5th Cir. 2017).** The Fifth Circuit Court of Appeals upheld the district court's dismissal of felony charges brought against oil rig contractors for violations of regulations enacted under the Outer Continental Shelf Lands Act (OCSLA). The Fifth Circuit held that the regulations did not extend criminal liability to contractors—rather than operators or lessees—for alleged violations of OCSLA.

On November 16, 2012, a fatal explosion occurred at an oil production platform operated under a federal oil and gas lease by Black Elk Energy Offshore Operations, LLC (Black Elk) in a portion of the Gulf of Mexico known as the West Delta 32 Lease Block. *Id*. at *2. The explosion occurred when contractors hired by Black Elk were performing welding construction work on a West Delta 32 platform. *Id*. Black Elk hired contractors from Grand Isle Shipyards, Inc. (GIS), and Wood Group PSN, Inc. (Wood Group) to complete the work designed by Compass Engineering and Consulting, LLC (Compass). *Id*. Three men were killed in the explosion.

Criminal indictments were issued three years later against Black Elk, as the lessee-operator, and the contractor appellees (GIS, Wood Group, and individuals employed by them or Compass, Don Moss, Christopher Srubar, and Curtis Dantin) alleging eight counts of violations of 43 U.S.C. § 1350(c) for knowing and willful violations of OCSLA's enabling regulations at 30 C.F.R. §§ 250.113 and 250.146. *Id*. The contractors were also charged with several misdemeanor Clean Water Act violations. *Id*.

The defendants filed motions to dismiss, and the district court dismissed the OCSLA charges against Wood Group, GIS, Moss, and Dantin and Srubar. *Id*. at *3. The district court analyzed each of the regulatory provisions cited in the indictment and concluded that none of the OCSLA regulations apply to oilfield contractors. *Id*. The district court observed that each of the OCSLA regulations underlying the criminal charges imposed obligations on "you," defined in OCSLA regulations as "*you* means a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement." 30 C.F.R. § 105. *Id*. The district court interpreted this language to expressly exclude contractors from OCSLA criminal liability. The government appealed to the Fifth Circuit, which affirmed the district court's dismissal of the OCSLA claims against the contractors. *Id*.

The Fifth Circuit introduced its decision by explaining that "[f]or over 60 years the federal government did not regulate or prosecute oilfield contractors, as opposed to lessees, permittees, or well operators, under OCSLA." *Id*. at *1. Following the Deepwater Horizon spill, the Department of the Interior was reorganized to include a new agency, the Bureau of Safety and Environmental Enforcement (BSEE). Shortly before the incident that gave rise to this case, BSEE issued an internal "Interim Policy Document" opining that contractors may be liable for civil penalties under OCSLA, although this document made no mention of criminal liability. *Id*.

Against this backdrop, the Fifth Circuit rejected the government's various arguments, including that a section of OCSLA regulations provides a lessee and "the person actually performing the activity to which the requirement applies are jointly and severally responsible for complying with the regulation." 30 C.F.R. § 250.146(c). *Id*. at *5. The government argued this section created joint and several criminal liability for contractors. *Id*. The Fifth Circuit rejected this argument, reasoning that Section 146(c) explains that only the lessee or permit holder is responsible for complying with OCSLA regulations. The court also rejected the government's concept of joint and several criminal

liability, reasoning that term is ". . . a term of art reserved for civil rather than criminal liability." *Id*.

Finally, the Fifth Circuit's affirmance of the district court included sharp criticism of the government's prosecution of the contractors:

> It was novel for the government to indict these appellees for violating the welding regulations, the regulatory duty for which rested on "You," the lessees, permittees and designated operators of the West Delta Lease Block 32 facilities. No prior judicial decision countenanced this action, which is at odds with a half century of agency policy, and we will not do so now.

Id. at 10.

MULTI-JURISDICTIONAL FLOOD CONTROL PROJECT CANNOT PROCEED WITHOUT STATE PERMIT

Brian Wauhop

***Board of Comm'rs of the S.E. La. Flood Prot. Auth. v. Tennessee Gas Pipeline Co., LLC*, 850 F.3d 714 (5th Cir. Mar. 3, 2017).** In *Richland/Wilkin Joint Powers Authority v. United States Army, Corps of Engineers, et al*., 2017 WL 3972471, Docket No. 13-2262 (D. Minn. Sept. 7, 2017) a Minnesota district court enjoined further construction of a $2.2 billion flood control project (the "Project") in the Red River Valley. The Project, which will receive partial federal funding, was developed to prevent the significant flooding that continually threatens areas of North Dakota and Minnesota along the Red River. *Id*. at * 2.

After years of planning and development, the Army Corps of Engineers (ACOE) and the Fargo–Moorhead Flood Diversion Board of Authority (the "Diversion Authority")—a joint authority formed pursuant to Minnesota's and North Dakota's joint powers statutes to complete the Project—signed a project partnership agreement (PPA) that ". . . sets forth the rights and obligations of the Corps and the Diversion Authority pertaining to Project construction and operation." *Id*. at *2. However, the PPA was executed before the Minnesota Department of Natural Resources (DNR) had issued the Dam Safety and Public Waters Work Permit ("Permit") needed for the Project. *Id.* at 3. The Permit application was still pending before DNR at the time the PPA was signed. *Id*.

DNR denied the Permit application eight months after the PPA was executed by the ACOE and Diversion Authority. *Id*. DNR found the Project did not adequately protect the health, safety, and welfare of Minnesota citizens, and determined the Project did not comply with environmental and floodplain requirements and local/land resources management plans. *Id*. Despite the Permit denial, the ACOE and Diversion Authority announced their intent to move forward with construction of the Project. *Id*.

The Richland/Wilkin Joint Powers Authority (JPA), a citizens group formed by Richland County, North Dakota, and Wilkin County, Minnesota, to protect their citizens and property from flooding, filed a complaint against the ACOE and the Diversion Authority. *Id*. at *4. JPA amended its complaint several times, ultimately alleging violations of the federal Administrative Procedure Act (APA) pursuant to 33 U.S.C. § 2232 (governing construction of water resources development projects by non-federal interests, like the Diversion Authority); the Water Resources Reform and Development Act of 2014, which authorized the project ("WRRDA-2014"); and Minnesota state environmental laws. *Id* at *4–5. After it denied the Permit application, DNR intervened in the federal action advancing similar claims. *Id*. at *5. DNR and JPA argued that 33 U.S.C. § 2232 and numerous provisions of WRRDA-2014 require compliance with state law (which required the Project to have the Permit), and that by executing the PPA without the Permit, the ACOE and the Diversion Authority had violated WRRDA-2014 and APA. *Id*. DNR and JPA asked the court to enjoin further construction of the project until the Permit was obtained. *Id*.

The district court held that DNR and JPA established all the elements required to obtain an injunction. *Id*. at *16–24. In particular, the court reasoned that both challengers established that their claims were likely to succeed on the merits, which is the predominant element in the preliminary injunction analysis. *Id*. at *14, 16. DNR and JPA presented uncontested evidence establishing that prior to the execution of the PPA, DNR had advised the ACOE numerous times that the Permit had to be obtained before beginning construction on the Project. *Id*. at *16. The court held this uncontested evidence showed a likelihood of success regarding the claims against the ACOE:

> Based upon these uncontested facts, the DNR and JPA have a fair chance of prevailing on their section 2232 claim. . . . Section 2232(b)(2)(a) requires that "[b]efore" the Diversion Authority carries out the Project, it must "obtain any permit or approval required in connection with the project . . . under Federal or State law." The statute further requires the Corps to "monitor and audit" the Project to ensure "the construction is carried out in compliance with the requirements" of section 2232. 33 U.S.C. § 2232(d)(4). Here, the DNR and JPA present evidence the DNR informed the Corps that regulatory issues regarding the Diversion Authority were outstanding and, in spite of this warning, the Corps signed the PPA allowing the Diversion Authority to begin construction of the Project. Under this set of facts, the DNR and JPA have shown a likelihood of success on their claim that signing the PPA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because the Corps' actions violated section 2232.

Id. The court reached the same conclusion regarding likelihood of success on the WRRDA-2014 claims against the ACOE, as that specific legislation providing federal funding for the project also required compliance with state laws and regulations. *Id*. at 18.

Further, the court determined DNR and JPA satisfied all the elements for obtaining an injunction against the Diversion Authority for various state law violations, again based on signing the PPA and starting construction of the Project prior to obtaining the Permit. *Id*. at 18–24.

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CASE LAW HIGHLIGHTS: SOUTHEAST

D.C. CIRCUIT UPHOLDS GRANT OF LICENSE TO EXPORT LNG

Laura Glickman and Bridget R. Reineking

***Sierra Club v. U.S. Department of Energy*, 867 F.3d 189 (D.C. Cir. 2017).** On August 15, 2017, the U.S. Court of Appeals for the D.C. Circuit upheld the U.S. Department of Energy's (DOE's) grant of a license to Freeport LNG Expansion, L.P., and its related entities (collectively, Freeport), to export liquefied natural gas (LNG) from LNG terminals and liquefaction facilities on Quintana Island in Brazoria County, Texas. *Sierra Club v. U.S. Department of Energy*, 867 F.3d 189 (D.C. Cir. 2017). The court determined that DOE did not violate the National Environmental Policy Act (NEPA) by approving Freeport's applications to export LNG when it failed to quantify indirect impacts of export-induced natural gas production in the United States or to tailor them to specific levels of exports or export-induced gas production.

Section 3 of the Natural Gas Act (NGA) authorizes the exportation of natural gas from the United States unless DOE finds that doing so "will not be consistent with the public interest." 15 U.S.C. § 717b(a). DOE's determination in this regard depends on whether the country to which the gas will be exported is one with which the United States has a "free trade agreement requiring

national treatment for trade in natural gas" (a Free Trade country). *Id.* § 717b(c). If so, DOE must authorize the exportation to that country "without modification or delay." *Id*. If the country does not have such an agreement with the United States (a non-Free Trade country), then DOE must independently determine whether such exports would be inconsistent with the public interest. (Rather than assign LNG export applications to particular end-user destinations, the applications are designated for export to either Free Trade or non-Free Trade countries, generally.)

In 2011, Freeport requested permission from DOE to export an amount of LNG out of its terminal on Quintana Island. *Sierra Club*, 867 F.3d at 192. Freeport submitted four separate applications seeking LNG export authorizations—two for Free Trade countries and two for non-Free Trade countries. *Id.* at 193. In accordance with the NGA, DOE promptly granted Freeport's Free Trade applications. The Federal Energy Regulatory Commission's (FERC's) review was ongoing, however, because Freeport had concurrently sought authorization from FERC both to modify its facilities to better support gas exports, and to construct additional gas liquefaction facilities to supplement its export operations. *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 42 (D.C. Cir. 2016). As a result, DOE conditionally approved Freeport's application with respect to non-Free Trade Countries in May and November 2013. The conditional order explained that DOE would participate in FERC's ongoing review as a cooperating agency, and that DOE's final authorization would be contingent on satisfactory completion of that environmental review process. *Sierra Club*, 867 F.3d at 193; 40 C.F.R. § 1501.6(b).

In accordance with NEPA, FERC released its final environmental impact statement for the Freeport Terminal construction project (the Impact Statement) in June 2014. The Impact Statement disclosed and analyzed direct, indirect, and cumulative impacts from the construction and operation of the proposed liquefaction and export facilities. However, it did not evaluate the indirect effects pertaining to the authorization of exports. *Id.* at 195. DOE adopted the Impact Statement in full, supplemented it with two reports that examined certain indirect effects of LNG exports, and issued final approval for Freeport's non-Free Trade Country applications in November 2014 pursuant to section 3(a) of the Natural Gas Act, finding the proposed exports were in the "public interest." *Id.* at 196.

The Sierra Club challenged DOE's determination in the D.C. Circuit, arguing that DOE failed to fulfill its obligation under NEPA and the NGA by failing to examine the indirect and cumulative effects of LNG exports. *Id.* The court first addressed DOE's NEPA review, using the "arbitrary and capricious" standard. *Id.* As a threshold matter, the court limited its analysis to the indirect effects of DOE's determination, finding that the nature of DOE's environmental review was not tailored to any specific level of exports and so its indirect effects analysis would equal a cumulative effects analysis. *Id.* at 197. The court went on to explain that DOE was entitled to deference regarding its determination that estimating localized impacts would be "far too speculative" an exercise with respect to LNG exports. *Id.* at 199. The court similarly found that the DOE's determination not to perform a regional analysis of indirect effects was consistent with the "rule of reason." *Id.* at 200. And with respect to DOE's analysis of the effect that LNG exports would have on net global greenhouse-gas emissions, the court found "nothing arbitrary" about DOE's conclusion that such an analysis would require consideration of the dynamics of all energy markets in LNG-importing nations, and given the many uncertainties in modeling such market dynamics, the analysis would be "'too speculative to inform the public interest determination.'" *Id.* at 202 (citations omitted).

Finally, based in large part on its NEPA analysis, the court found that DOE had not rendered an "arbitrary and capricious" determination under NGA's "public interest" test. *Id.* at 203, citing 15

U.S.C. § 717b(a). Noting that Sierra Club "repeats the same argument it made to support its NEPA claim—namely, that the Department arbitrarily failed to evaluate foreseeable indirect effects of exports," the court found no basis for questioning the scope of DOE's evaluation for purposes of the NGA. Accordingly, the court upheld DOE's final approval for Freeport's non-Free Trade country applications in full. *Id.* at 203.

D.C. CIRCUIT VACATES RULE REQUIRING REPLACEMENT OF HFCS

Laura Glickman and Bridget R. Reineking

***Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017)**. On August 17, 2017, the Court of Appeals for the D.C. Circuit vacated an EPA rule promulgated under the Clean Air Act that restricted the manufacturing of certain products that contain hydrofluorocarbons (HFCs). *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017). The D.C. Circuit found that EPA's interpretation of Section 612 of the Clean Air Act—upon which EPA relied as statutory authority for the rulemaking—was inconsistent with the statute as written.

The 1990 Amendments to the Clean Air Act added to the Clean Air Act a new Title VI, which regulates the production and use of certain ozone-depleting substances. Section 612(a) of Title VI requires ozone-depleting substances covered by that title to be "replaced" by substances "that reduce overall risks to human health and the environment." *Id.* at 457, quoting Section 612(a). To implement this subsection, EPA maintains lists of both safe and prohibited substitutes for ozone-depleting substances. *Id.* Section 612(c) makes it "unlawful to replace any" ozone-depleting substance covered by Title VI with a substitute that is on EPA's list of prohibited substitutes. *Id.*, quoting Section 612(c). Since 1990, many manufacturers of aerosols, motor vehicle air conditioners, commercial refrigerators, and other products, have replaced ozone-depleting substances with HFCs on EPA's list of safe substitutes. *Id.*

In 2015, citing Section 612(c) as its authority, EPA promulgated a rule that moved some HFCs from the list of safe substitutes to the list of prohibited substitutes. *Id.* As such, the key issue in the case was whether Section 612(c) conferred EPA the authority to force manufacturers that had already replaced ozone-depleting products with HFCs to no longer use HFCs in their products. *Id.* at 458. For many years, EPA had in fact taken the position that it lacked the authority under Section 612(c) to require the replacement of substitutes for ozone-depleting substances. *Id.*

The court's analysis centered on the meaning of the word "replace." *Id.* EPA argued that the initial substitution was not the only time when manufacturers "replace" an ozone-depleting substance. *Id.* Instead, EPA claimed that manufacturers replaced ozone-depleting substances with HFCs each time they used HFCs in their products. *Id.* The court found that EPA's interpretation of the word "replace" was inconsistent with its ordinary meaning, which is "to take the place of." *Id.* at 459. Once the transition to HFCs had occurred, "the replacement had been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance." *Id.* EPA's reading of the term "replace" therefore failed Chevron step 1. *Id.*

EPA also argued that it could require manufacturers to replace HFCs on the theory that EPA may retroactively conclude that a manufacturer's past decision to "replace" an ozone-depleting substance with HFCs is no longer lawful, even though the original replacement was lawful at the time it was made. *Id.* at 461. However, EPA did not articulate such a rationale in its 2015 final rule. *Id.* The court thus rejected EPA's "retroactive disapproval" theory, but outlined findings that EPA must make on remand in order to proceed under such a theory. *Id.* at 461–62.

FOURTH CIRCUIT INVALIDATES FAYETTE COUNTY BAN ON DISPOSAL OF WASTEWATER FROM OIL AND GAS WELLS

Laura Glickman and Bridget R. Reineking

***EQT Production Co. v. Wender*, No. 16-1938, 2017 U.S. App. LEXIS 16631 (4th Cir. Aug. 30, 2017).** On August 30, 2017, the Court of Appeals for the Fourth Circuit held that state law preempted a Fayette County, West Virginia, ordinance that banned the disposal of wastewater generated by oil and natural gas wells. *EQT Production Co. v. Wender*, No. 16-1938, 2017 U.S. App. LEXIS 16631 (4th Cir. Aug. 30, 2017). Accordingly, the Fourth Circuit affirmed the district court's award of summary judgment to plaintiff EQT Production Company.

West Virginia regulates the disposal of wastewater using two distinct but overlapping regimes created by the West Virginia Oil and Gas Act and the West Virginia Water Pollution Control Act. *Id.* at *3–4. Under the Oil and Gas Act, the Department of Environmental Protection (DEP) is responsible for regulating and permitting oil and gas wells in the state. *Id.* In addition, the Oil and Gas Act charges DEP with protecting against water pollution arising from oil and gas production. *Id.* at *3–4. In order to operate a disposal well, a DEP water-pollution control permit is required. *Id.* at *4. These permits require operators to monitor and conduct testing to ensure against leaks. *Id.* Regulations under the Oil and Gas Act also provide that disposal wells are subject to the permit requirements of "applicable federal and state laws." One such law is the Water Pollution Control Act, under which West Virginia has enacted a permit program for underground injection control (UIC) wells. *Id.* Also pursuant to the Water Pollution Control Act, DEP has promulgated comprehensive regulations for the UIC permit program that prohibit underground injection if "the presence of [a] contaminant may . . . adversely affect the health of persons." *Id.* at *5. Water Pollution Control Act regulations also require "corrective action" that may include closure of the well if water quality monitoring indicates movement of a contaminant into an underground well. *Id.*

In 2016, Fayette County enacted an "Ordinance Banning the Storage, Disposal, or Use of Oil and Natural Gas Waste in Fayette County, West Virginia" (hereinafter, the Ordinance). *Id*. at *8. The Ordinance broadly prohibited the "storage, treatment, injection, processing or permanent disposal" of wastewater "onto or into the land, air or waters within Fayette County," and specifically applied that ban "to injection wells for the purpose of permanently disposing of natural gas waste and oil waste." *Id.* at *8–9. The Ordinance specified that possession of a state or federal permit was not a defense to a violation of the Ordinance's prohibitions. *Id.* at *9.

The court held that the Ordinance's ban on the permanent disposal of wastewater in UIC wells was in conflict with the state UIC permit program, and thus preempted under the Water Pollution Control Act. *Id.* at *19. As a result, the court did not reach federal preemption arguments raised in this case. *Id.* In its analysis, the court turned first to traditional statements regarding the powers of West Virginia localities, including that county commissions are creatures of the state and, as such, only have the limited powers granted by the state constitution and legislature. *Id.* at *20, citing *Butler v. Tucker*, 416 S.E.2d 262, 267 (W.Va. 1992). Against this principle, Fayette County argued that the savings clause of the Water Pollution Control Act, which preserved the power of local entities to "suppress nuisances" or "abate any pollution," permitted Fayette County to enact the Ordinance without running afoul of the state's UIC permit program. *Id.* at *22–23.

The court found that even if Fayette County's interpretation of the savings clause were correct, that clause alone could not resolve the inconsistency between the Ordinance's ban on UIC wells and the state laws that govern those wells. *Id.* at *23. Because the Oil and Gas Act and Water Pollution Control Act were intertwined, as described above, it is unclear whether a savings

clause in either statute but not the other could authorize an otherwise inconsistent local ordinance. *Id.* at *24. The court also rejected Fayette County's broad reading of the Water Pollution Control Act's savings clause, finding that Fayette County's interpretation would authorize counties to prohibit the same conduct that is specifically sanctioned and permitted by the state, so long as counties label that conduct a "nuisance." *Id.* Instead, the court gave the savings clause "its more logical reading—not as a self-defeating instrument for nullification of state permits, [] but as clarification that possession of a state permit will not preclude all local regulation touching on the licensed activity, [] and in particular, as preservation of the County's right to bring a common law action for public nuisance against a state-permitted UIC well." *Id.* at *25–26 (citations omitted). Moreover, the court noted, there is no indication in the record that plaintiff EQT Production Co.'s state-permitted UIC wells constituted a nuisance as defined by common law, nor had Fayette County brought a common law nuisance claim against the plaintiff. *Id.* at *27.

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CASE LAW HIGHLIGHTS: NORTHEAST

NO FRAUDULENT JOINDER OF DUPONT'S CORPORATE REMEDIATION DIRECTOR IN $1 BILLION N.J. ISRA LAWSUIT

Steven German

***Carneys Point Twp. v. E. I. Du Pont De Nemours & Co.*, (No. 1:17-cv-00264) 2017 WL 3189886, at *7 (D.N.J. July 26, 2017).** On July 26, 2017, U.S. District Judge Noel L. Hillman of the District of New Jersey remanded to New Jersey Superior Court the Carneys Point Township's 2016 lawsuit against chemical giant DuPont and its Director of the Corporate Remediation Group, Sheryl A. Telford, alleging violations of New Jersey's Industrial Site Recovery Act (ISRA), finding that Telford was not fraudulently joined to defeat diversity jurisdiction.

DuPont argued that the District of New Jersey could exercise subject matter jurisdiction over the matter because diversity of citizenship exists between Plaintiff Carneys Point Township—a citizen of New Jersey—and Defendant DuPont—a citizen of Delaware. DuPont urged the court to ignore the citizenship of Defendant Teflord on the basis that she was "fraudulently joined" for the sole purpose to prevent removal.

The lawsuit alleges that Dupont's Chambers Works released over 100 million pounds of toxic chemicals into the water and ground from the late 19th century until the early 1970s. The lawsuit alleges that DuPont spun off its Chambers Works property in an attempt to avoid a $1 billion cleanup liability. Chambers Works was among a group of properties transferred to another company, Chemours, in 2014 and 2015 ahead of a proposed merger with Dow Chemical. According to the suit, the transfer was carried out to avoid cleanup liability and to make DuPont a "more attractive merger partner" to Dow. The transfer shifted most of DuPont's environmental liabilities to Chemours, according to the lawsuit. The suit alleged that DuPont failed to remediate the property before the transfer in violation of ISRA. It was alleged

that if it had to bear the massive liability related to the cleanup, Chemours, which is far smaller than DuPont, would likely go bankrupt, leaving Chambers Works "a rusting industrial nightmare that the residents of New Jersey will be left to clean up without the funds to do so." The town alleged that Telford knowingly directed and authorized these activities.

The district court explained that the fraudulent joinder doctrine allows a diverse defendant to remove the action to federal court, notwithstanding the presence of a non-diverse co-defendant, if it can establish that the non-diverse defendant was fraudulently joined solely to defeat diversity jurisdiction. *Carneys Point Twp. v. E. I. Du Pont De Nemours & Co*., No. 2017 WL 3189886, at *7 (D.N.J. July 26, 2017) (citations omitted). Joinder is fraudulent if there is no reasonable basis in fact supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment. *Id*. at 8 (citations omitted).

The district court then analyzed the allegations against Telford and determined that she potentially could be held liable under ISRA and was therefore a proper defendant:

> It cannot be held frivolous to claim that Telford, the director of DuPont's remediation group who was "a DuPont manager responsible for ensuring environmental compliance and a former DEP official" and "knew DuPont's actions triggered ISRA," and who signed a letter sent to the NJDEP asking that DuPont's stock transfer be considered exempt from ISRA while knowing that she misinformed the NJDEP about the stock transfer, is an "officer or management official of an industrial establishment who knowingly directs or authorizes the violation of any provisions" of ISRA. * * * It is clear that Plaintiff's allegations against Telford meet the possibility-of-a-claim test for determining whether she was properly joined as a defendant. * * * Consequently, Defendants' removal of the action based on the fraudulent joinder doctrine is unavailing, and the matter must be remanded to New Jersey Superior Court.

LONG ISLAND WATER CONFERENCE, NORTHROP GRUMMAN SPAR OVER STATUTE OF LIMITATIONS IN LONG ISLAND GROUNDWATER CONTAMINATION SUIT

Steven German

***Bethpage Water District v. Northrop Grumman Corp.*, No. 16-2592 (2d Cir.).** Is the claim time-barred, or is it not even yet ripe? The Second Circuit must answer this question in the context of threatened groundwater contamination in Bethpage, New York

The Long Island Water Conference, the Nassau Suffolk Water Commissioners' Association, and the Nassau County Village Officials Association on September 18, 2017, filed an amicus brief in support of the Bethpage Water District's appeal of the Eastern District of New York's March 2016 decision holding that the Bethpage Water District's groundwater contamination claims were time-barred under New York CPLR § 214-c(2) and the various holdings in *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig*., once the Water District acted to prevent contamination of its water supply well.

The lawsuit arises from allegations that Northrop Grumman and its predecessors contaminated groundwater that threatened the drinking water supply to approximately 33,000 residents who obtain water from Long Island's sole source aquifer. Northrop's predecessor manufactured industrial and military equipment in Bethpage, which resulted in groundwater contamination by volatile organic compounds.

The lawsuit was dismissed in July 2016, after District Judge Fuersetin adopted the findings of Magistrate Judge Shields that the lawsuit was

filed long after the expiration of the statute of limitations. In her Report and Recommendation, Magistrate Shields rejected the Water District's request for an "in the wellhead" accrual standard. Instead, the Magistrate accepted Northrop's argument that the limitations period accrued in November 2009 when the Water District knew that the contamination plume was approaching its wells, expended money for its engineers to design the treatment facility, and initiated municipal bonding to finance the upgrades which the Water District anticipated it would need in case the contaminants actually impacted the well.

Amici argued accrual of the Water District's claim requires exposure to contamination, specifically the migration of contaminants into the wellhead, and that anticipatory action was insufficient to trigger the statute of limitations on its damage claims for contaminated water. Amici also advanced a public policy argument, warning that the district court's decision would deter water providers from investigating possible toxic plumes and implementing harm prevention measures out of fear of triggering a statute of limitations before an actual injury to their water rights has occurred.

In response, Northrop argued that water providers are injured as soon as they reasonably have to act to install new treatment systems or shut down supply wells, and that this injury triggers the statute of limitations. It said the district court properly found that the actions of the Bethpage Water District proved it clearly knew of its alleged injury more than three years before filing suit. Citing *In re MTBE* (2013), it argued that an injury could accrue to a water provider before contamination exceeded a regulatory limit in a well, thus both allowing a claim for relief and triggering the limitations period governing that claim, because of a reasonable water providers' duty to prevent unsafe contamination of the water supply, not just react to such conditions after the fact.

PLAINTIFF FAILS TO ADEQUATELY PLEAD STANDING UNDER RCRA CITIZEN SUIT PROVISION IN SUIT AGAINST EXXON FOR CLIMATE CHANGE AND SEA RISE IMPACTS IN "FAR FUTURE"

Steven German

***Conservation Law Foundation v. ExxonMobil Corp.*, 1:16-cv-11950-MLW (D. Mass. Sept. 13, 2017).** A Massachusetts federal judge has ruled that the Conservation Law Foundation (CLF) failed to adequately plead standing to sue ExxonMobil Corp. (Exxon) for injuries the group alleged would result decades from now as result of climate change and future sea level rises, but found that CLF did allege sufficient standing to sue over present-day and near-future harms from such events.

The CLF filed suit in September 2016, alleging that Boston-area communities were jeopardized by Exxon's failure to properly safeguard hazardous materials at its Everett Terminal waterside petroleum storage facility from rising seas and more storms due to climate change-induced risks (Complaint ¶¶ 183–86):

> ExxonMobil's failure to adapt the Everett Terminal to increased precipitation, rising sea levels and storm surges of increasing frequency and magnitude puts the facility, the public health, and the environment at great risk because a significant storm surge, rise in sea level, and/or extreme rainfall event may flood the facility and release solid and hazardous wastes into the Island End River, Mystic River, and directly onto the city streets of Everett. * * * ExxonMobil's operation of its Everett Terminal presents an "imminent and substantial endangerment to health or the environment" because sea level rise, increased precipitation and flooding and severe storm impacts (including wind, storm surge and pounding surf) will result in releases of solid and/or hazardous wastes into the environment and surrounding residential communities. * * * Due to its failure to adapt to these risks, ExxonMobil has contributed and is contributing

> to the past or present handling, storage, treatment, transportation, or disposal of solid and hazardous wastes which may present an imminent and substantial endangerment to health or the environment under 42 U.S.C. § 6972(a)(1)(B), in violation of RCRA.

Exxon moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) in December 2016, arguing that plaintiff failed to allege actual or imminent harm to its members because their alleged injury was premised on "a chain of speculative and uncertain events": (1) that the sea level will rise by four or more feet, (2) that the theoretical rise in sea level would inundate the terminal; (3) that the inundation would release an unspecified quantity of unidentified contaminants into the Island End River; and (4) that the contaminants would impair some CLF member's use or enjoyment of New England's waterways. Memorandum in Support of Motion to Dismiss (Doc. No. 17, at 13).

Plaintiff argued that its injuries were actual and imminent in the form of present-day storm surges, severe weather events, and increased precipitation. "Because Exxon has not prepared its Terminal for these impacts," argued plaintiff, "the risk of catastrophic effects on human health and the environment is immediate." Memorandum in Opposition (Doc. No. 20, at 11). Citing widely accepted climate change studies, as well as Exxon's own climate change research indicating that the alleged climate change risks could be reasonably anticipated, plaintiff further argued that "one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id.* at 9–10.

The district judge held that CLF lacked standing to sue for harms that allegedly would result from rises in sea level or increases in storm flooding or severity that would take place in the distant future, such as in 2050 or 2100. "Such potential harms are not 'imminent' and the claims concerning them are not ripe for decision because, among other reasons, the Environmental Protection Agency may require changes to the permit that will prevent the harms from occurring," the judge wrote. Opinion at 2–3. However, the judge further held that CLF pled adequate standing and a "plausible claim that there is a 'substantial risk' that severe weather events, such as storm surges, heavy rainfall, or flooding, will cause the terminal to discharge pollutants into those areas in the near future and while the Permit is in effect" and that these actual and imminent harms are redressable by the court through an order that defendant comply with the Permit. *Id.* at 2.

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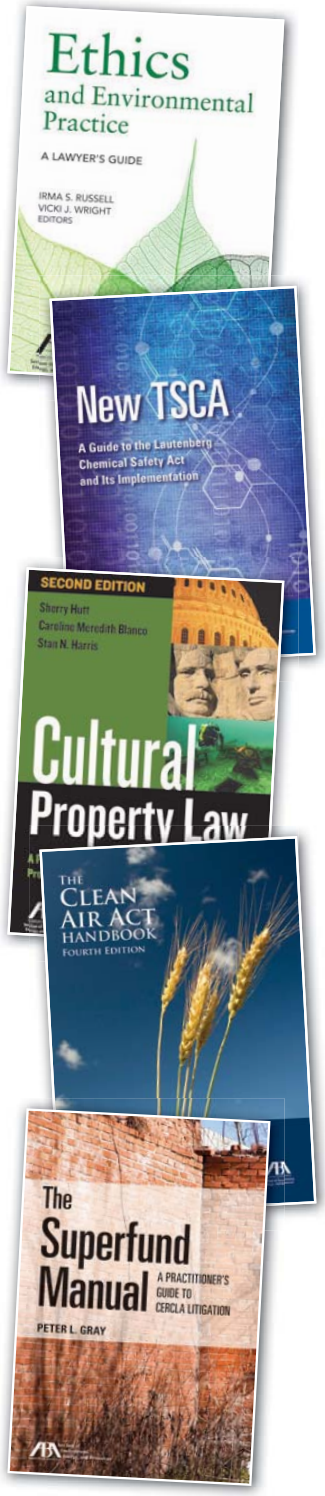

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